FILED
MAY 31 1991
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(5)

No. 90-1194

In the Supreme Court of the United States

OCTOBER TERM, 1990

MAINE PUBLIC UTILITIES COMMISSION, PETITIONER

v.

MAINE YANKEE ATOMIC POWER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

A Maine statute, the Nuclear Decommissioning Financing Act, Me. Rev. Stat. Ann. tit. 35-A, §§ 4351-4359 (1988), requires an electric utility to establish a trust fund, and to obtain state approval of a plan for accumulating adequate reserves in that fund, to finance the decommissioning of a nuclear generating plant located in that state. The question presented is whether an order issued by petitioner under authority of that statute is preempted by the Atomic Energy Act or the Federal Power Act, or conflicts with an order of the Federal Energy Regulatory Commission issued under the latter Act.

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This brief is submitted in response to the Court's order inviting the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

Respondent Maine Yankee Atomic Power Company owns and operates a nuclear electric generating unit in Wiscasset, Maine, under an operating license from the Nuclear Regulatory Commission. Maine Yankee is owned by ten "sponsors," investor-owned electric utilities located in Maine, New Hampshire, Vermont, Massachusetts, and Connecticut. The sponsors purchase, for resale, all of the electricity produced by Maine Yankee's Wiscasset nuclear unit. Pet. App. 2. The Maine Supreme Judicial Court held

that an order of petitioner Maine Public Utilities Commission obligating Maine Yankee to set aside specified sums to finance the plant's decommissioning costs, and the statute on which the order was based, are preempted by the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.*, and Title II of the Federal Power Act, 16 U.S.C. 824 *et seq.*

1.a. Under the AEA, the Nuclear Regulatory Commission has exclusive authority to regulate the radiological health and safety aspects of nuclear generating plants. *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 205-212 (1983). See *English* v. *General Elec. Co.*, 110 S.Ct. 2270, 2276-2278 (1990). Exercising this authority, the NRC has promulgated technical and financial requirements for "decommissioning" licensed nuclear facilities. 53 Fed. Reg. 24,018 (1988). A nuclear facility is decommissioned at the end of its useful life "to remove [it] safely from service" and "to reduce residual radioactivity to a level that permits release of the property for unrestricted use and termination of the license." 10 C.F.R. 50.2. The NRC's regulations prescribe the methods through which nuclear plants are to be decommissioned, establish minimum funding levels for decommissioning, and require each licensee to create a separate decommissioning fund and formulate a decommissioning financing plan. See 53 Fed. Reg. 24,019-24,056 (1988).

The NRC's minimum funding requirements, like its other decommissioning regulations, have "the narrow focus of protecting public health and safety." 53 Fed. Reg. 24,038 (1988). Because other concerns are also potentially relevant to decommissioning financing, the NRC's regulations note that "[f]unding for decommissioning of electric utilities is also subject to the regulation of agencies (*e.g.*, Federal Energy Regulatory Commission (FERC) and State Public Utility Commissions) having jurisdiction over rate regulation." 10 C.F.R. 50.75(a). In particular, the NRC's regula-

tions do not "deal with financial ratemaking issues such as rate of fund collection, procedures for fund collection, cost to ratepayers, taxation effects, equitability between early and later ratepayers, accounting procedures, ratepayer versus stockholder considerations, responsiveness to change and other similar concerns." 53 Fed. Reg. 24,038 (1988).

b. FERC has exclusive jurisdiction over "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 340 (1982). A utility must file with FERC "schedules showing all rates and charges for any * * * sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges." 16 U.S.C. 824d(c). In the event of a dispute over the rate charged by a utility in a transaction subject to FERC's jurisdiction, FERC is empowered to determine whether the rate (or the classifications, practices, regulations, or agreements on which the rate is based) are reasonable and, if they are not, to substitute reasonable terms. 16 U.S.C. 824e(a). Section 272 of the AEA, 42 U.S.C. 2019, specifically recognizes FERC's authority over wholesale sales of electric power generated at nuclear facilities. 42 U.S.C. 2019. Because Maine Yankee sells all of its power at wholesale, FERC has exclusive jurisdiction over the rates and terms at which that utility sells its power.

Reserves for decommissioning costs of nuclear facilities have traditionally been treated by FERC, in conjunction with depreciation expense, as a cost of service to be recovered from ratepayers. *Indiana & Michigan Municipal Distributors Ass'n* v. *Indiana Michigan Power Co.*, 49 F.E.R.C. ¶ 63,020, at 65,084 (1989). In order to assure that the costs of decommissioning nuclear facilities are equitably borne by those who receive the power, the Commission has determined that "[t]he same ratepayers bearing a deprecia-

tion charge for nuclear plant also should bear a decommissioning charge applicable to that plant." *Ibid.* See *Boston Edison Co.*, 34 F.E.R.C. ¶ 63,023, at 65,076 (1986) (recovery of decommissioning costs should "be spread equitably over today's and tomorrow's consumers").

2. In accordance with NRC regulations, Maine Yankee has established a decommissioning fund and has made regular payments into it. Since 1981, the utility's contributions to the decommissioning fund have been set forth in wholesale rate tariffs Maine Yankee has filed with FERC. Petitioner requested this treatment of Maine Yankee's funding costs, *Maine Yankee Atomic Power Co.*, 17 F.E.R.C. ¶ 61,208, at 61,399-61,400 (1981), in order to assure Maine Yankee's contributions to its decommissioning fund could not be changed without FERC's advance approval. A series of FERC orders have given effect to tariffs specifying the payments that Maine Yankee would make into its decommissioning fund. Pet. App. 3-4.[1]

In 1988, Maine Yankee petitioned FERC for an order allowing it to pay $14,466,467 per year for ten years into its decommissioning fund, in order to accumulate a total of $178,097,900 (in 1987 dollars). After petitioner intervened in the proceeding, FERC rejected Maine Yankee's accelerated funding schedule and required the company to "file revised rates, reflecting recovery of decommissioning costs over the nuclear unit's remaining life." Pet. App. 5. Thereafter, Maine Yankee filed a settlement agreement with

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[1] See, *e.g.*, *Maine Yankee Atomic Power Co.*, 17 F.E.R.C. ¶ 61,208 (1981); *Maine Yankee Atomic Power Co.*, 20 F.E.R.C. ¶ 61,141 (1982); *Maine Yankee Atomic Power Co.*, 31 F.E.R.C. ¶ 61,068 (1985); *Maine Yankee Atomic Power Co.*, 42 F.E.R.C. ¶ 61,307 (1988); *Maine Yankee Atomic Power Co.*, 43 F.E.R.C. ¶ 61,453 (1988); *Maine Yankee Atomic Power Co.*, 44 F.E.R.C. ¶ 61,368 (1988).

FERC that fixed decommissioning costs at $167,000,000 (in 1987 dollars); provided for 20 annual payments of $9,073,943 to the decommissioning fund; and prescribed a return of 12.9% on equity. In addition, the settlement contained a "stay-out" provision prohibiting Maine Yankee, until February 1991, from seeking a rate increase to finance higher contributions to the decommissioning fund. Neither petitioner nor any other party to the proceeding objected to the settlement or sought judicial review of FERC's order approving it. *Id.* at 5-6, 20.

3. Since 1982, Maine Yankee has also been involved in proceedings under Maine's Nuclear Decommissioning Financing Act (NDFA), Me. Rev. Stat. Ann. tit. 35-A, §§ 4351-4359 (1988) (Pet. App. 94-117). That statute requires, *inter alia*, that a licensee operating a nuclear power plant in Maine submit a proposed decommissioning financing plan to petitioner for review and approval. In 1982, Maine Yankee filed a proposed plan with petitioner. Petitioner ruled that the filing was incomplete, but granted Maine Yankee's request for additional time to supplement the plan. Petitioner approved an interim financing plan in 1983, but has not yet approved a final financing plan. Pet. App. 4-5.

In March 1989, Maine Yankee filed a motion with petitioner in which it sought to incorporate the terms of the FERC-approved settlement in its interim financing plan and to obtain final approval of the plan. Pet. App. 6. Petitioner set a hearing on the motion. In advance of the hearing, Maine Yankee sought a ruling that petitioner was preempted by federal law from ordering any changes to the schedule of payments prescribed by the FERC order for Maine Yankee's decommissioning fund. *Id.* at 21.

In the order at issue in this case, petitioner ruled that it was not required to observe the terms of the FERC-approved settlement. Pet. App. 25-54. Petitioner further

concluded that the settlement provided an inadequate sum for decommissioning, and it ordered Maine Yankee, beginning on March 1, 1990, to make payments to the decommissioning trust fund greater than the amounts stated in Maine Yankee's FERC rate schedule. *Id.* at 90-91. Specifically, petitioner determined that the reasonable cost of decommissioning Maine Yankee's atomic unit would be $178,097,900 (in 1987 dollars); an annual payment of approximately $9,793,904 is required to produce that sum. *Id.* at 81, 91.

Maine Yankee sought reconsideration of the order, arguing that it could not amend its rates to collect the increased amount required by the state order without FERC's approval and that the "stay out" provision of the settlement agreement approved by FERC prohibited it from seeking such an increase. Petitioner responded that its earlier order was not intended to require Maine Yankee to collect the increased amount from its customers, "because a change in amount from customers must be made by FERC." Br. in Opp. App. 43. Rather, petitioner continued, "[t]he additional amount we ordered into the Trust Fund must come from Maine Yankee, essentially from shareholders or sponsors, until such time as the FERC allows these costs to be collected in rates." *Ibid.*

4. Maine Yankee sought judicial review.[2] The Maine Supreme Judicial Court vacated petitioner's order, finding that the NDFA and petitioner's order are preempted by federal law. Pet. App. 1-15. The court set forth two alternative grounds for that determination.

a. First, finding that it was impossible for Maine Yankee to comply both with the 1988 FERC order approving the funding arrangement prescribed by the company's settlement agreement and with petitioner's order, the court held that "[petitioner's] order and the NDFA interfere imper-

[2] Petitioner stayed its order pending appeal. Pet. App. 44-45.

missibly with FERC's exclusive jurisdiction over wholesale rates." Pet. App. 12. The court explained that FERC's order required that decommissioning expense be "collected from ratepayers as a cost of service" and prohibited a request for a rate increase prior to February 1991, thereby "prevent[ing] [Maine Yankee] from raising the revenues necessary to meet the demands of [petitioner's] order." *Id.* at 10. Since FERC had fixed the rate of return on equity at 12.9%, the court continued, petitioner's direction that additional funding for decommissioning come from the assets of Maine Yankee and its sponsors "impermissibly mandated a reduction in the sponsors' rate of return and weaken[ed] the company's financial base." *Ibid.*

The court rejected petitioner's contention that its order did not interfere with FERC's ratemaking because the order affected Maine Yankee's rates only indirectly. Pet. App. 11-12. The court explained that under *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), and *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988), "FERC's exclusive jurisdiction applies not only to rates, but to the components that affect wholesale rates." Pet. App. 11. This principle applies to Maine Yankee's decommissioning financing plan, the court concluded, since that plan "directly affect[s] the calculation of reasonable wholesale rates over which FERC exercises exclusive jurisdiction." *Id.* at 11-12.

b. The court also held that the order and the statute impermissibly intrude on a field that is pervasively regulated by federal law. Pet. App. 12-15. The state court noted that this Court's decision in *Pacific Gas & Electric* establishes, as petitioner conceded, that "state regulation of nuclear power is preempted when its purpose is to regulate safety, even when it does not directly conflict with federal law." Pet. App. 13. "In enacting the NDFA," the court found, "the [Maine] Legislature stated that 'timely proper decom-

missioning of any nuclear power plant . . . is essential to protect public health, safety and the environment.'" *Id.* at 15 (quoting Me. Rev. Stat. Ann. tit. 35-A, § 4351 (1988)). The court held, accordingly, that "[b]ecause Congress has clearly manifested an intent to maintain complete control over the safety and nuclear aspects of energy generation, the NDFA is preempted." Pet. App. 15 (internal quotation marks omitted).

In reaching this conclusion, the court noted that the NRC's regulations "permit the appropriate state or federal ratesetting agency to regulate funding for decommissioning." Pet. App. 14. But it held that "in the case of *wholesale* rate setting, that agency would be FERC." *Ibid.* In view of the Federal Power Act's application to wholesale sales of power, the court continued, "the decommissioning of an atomic power plant engaged in the wholesale marketing of electricity in interstate commerce is not a matter subject to regulation by the state," and "state regulation must be preempted in this area." *Ibid.*[3]

DISCUSSION

The Supreme Judicial Court's decision is clearly correct on either of two alternative grounds. First, that court determined, relying on the language of the statute, that the purpose of the NDFA is "to protect public health, safety and the environment." Pet. App. 15. This determination of the state statute's purpose, by Maine's highest court, compels the conclusion that the statute is preempted by the Atomic Energy Act. Second, petitioner's order conflicts with a FERC order, within the scope of FERC's exclusive jurisdic-

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[3] The Court found it unnecessary to determine whether Section 468A of the Internal Revenue Code, 26 U.S.C. 468A, a provision governing the deductibility of contributions to a decommissioning trust fund, also preempts applicable state law. Pet. App. 14-15.

tion under the Federal Power Act, establishing the amount of Maine Yankee's annual contribution to its decommissioning fund. In our view, FERC properly exercised its jurisdiction in issuing that order, and, in any event, the validity of FERC's order is subject to challenge only in a direct appeal to a federal court of appeals. Because it is impossible for Maine Yankee to comply with both FERC's order and petitioner's order, petitioner's order cannot stand.

Because the state court's judgment may be sustained on these grounds, it is unnecessary, and would be inappropriate, for this Court to consider in this case the broader question whether the AEA and the FPA leave any room for state regulation of the decommissioning of nuclear facilities producing power subject to FERC's jurisdiction. Indeed, this is apparently the first case to address a state statute operating in that field.

1. In *Pacific Gas & Electric*, 461 U.S. at 205-206, 211-212, this Court established the fundamental division of regulatory authority over nuclear power plants. "[T]he Federal Government maintains complete control of the safety and 'nuclear' aspects of energy generation; the States exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like"; and FERC enjoys "broad authority * * * over the need for and pricing of electric power transmitted in interstate commerce."

Under this scheme, any effort at state regulation of the nuclear health and safety aspects of a nuclear power plant is preempted. "State safety regulation is not pre-empted only when it conflicts with federal law. Rather, the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the

States." 461 U.S. at 212.[4] Thus, a state law improperly infringes upon the area preempted by the Atomic Energy Act if its purpose is to regulate nuclear safety or it has "some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *English* v. *General Elec. Co.*, 110 S. Ct. at 2276-2278.

In *Pacific Gas & Electric*, the Court addressed a California statute that conditioned the construction of nuclear plants on a finding by a state agency that adequate facilities were available to dispose of resulting nuclear waste. Although "[t]here are both safety and economic aspects to the nuclear waste issue," 461 U.S. at 196, the State argued, and the court of appeals found, that the state statute was "aimed at economic problems, not radiation hazards," *id.* at 213. This Court upheld that finding. *Id.* at 216. In this case, by contrast, the Supreme Judicial Court reached the opposite conclusion. The court determined that the object of the NDFA was "to protect public health, safety and the environment." Pet. App. 15. This construction of state law by Maine's highest court is controlling,[5] and, as the court recognized, it is fatal to the NDFA and hence to petitioner's order issued thereunder.

2. Although petitioner fails to come to terms with the Supreme Judicial Court's determination of the NDFA's

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[4] Thus, petitioner's contention (Pet. 18) that the NDFA "does not conflict with NRC safety regulations" is immaterial. The Atomic Energy Act preempts even state regulation that seeks, on grounds of safety, to supplement the NRC's regulatory regime.

Petitioner does not suggest that the NDFA may be sustained as an exercise of authority ceded by the AEA to the State of Maine. See 461 U.S. at 208-209, 212-213 n.25.

[5] See, *e.g.*, *Wainwright* v. *Goode*, 464 U.S. 78, 84 (1983) (*per curiam*); *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 837 n.9 (1978); *Brown* v. *Ohio*, 432 U.S. 161, 167 (1977); *Gurley* v. *Rhoden*, 421 U.S. 200, 208 (1975); *O'Brien* v. *Skinner*, 414 U.S. 524, 531 (1974).

purpose, it also argues that the state order at issue may be sustained as "economic regulation of decommissioning funding" (Pet. 5). We disagree. In our view, regardless of the purpose of the order or of the statute under which it was issued, the order is preempted because it conflicts with a valid order issued by FERC within its area of exclusive jurisdiction under the Federal Power Act.

The NRC's regulations recognize that the decommissioning of nuclear facilities involves concerns other than nuclear safety. Accordingly, the regulations state that "[f]unding for decommissioning of electric utilities is also subject to the regulation of agencies * * * having jurisdiction over ratemaking." 10 C.F.R. 50.75. That regulation may address such matters as "rate of fund collection, procedures for fund collection, cost to ratepayers, taxation effects, equitability between early and later ratepayers, accounting procedures, ratepayer versus stockholder considerations, responsiveness to change and other similar concerns." 53 Fed. Reg. 24,038 (1988).[6]

Maine Yankee sells all of its power at wholesale. Thus, as petitioner concedes (Pet. 3), FERC has exclusive jurisdiction to address these considerations in the course of overseeing Maine Yankee's rates. See *Mississippi Power*, 487 U.S. at 371, 374; *Nantahala*, 476 U.S. at 966. See also *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 215-216 (1964). Petitioner contends, nevertheless, that the NDFA order does not interfere with FERC's exercise of this

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[6] Petitioner seriously mischaracterizes this NRC regulation when it suggests that "the NRC has delegated its exclusive jurisdiction over safety matters in the sphere of decommissioning funding to ratemaking agencies." Pet. 16. The NRC has delegated none of its responsibility for the safety aspects of nuclear power. Rather, it has simply recognized that regulation that is based on grounds other than safety and is consistent with NRC's safety-oriented requirements may subsist with the NRC regulatory scheme.

authority. It reasons that the NDFA does not restrict ratemaking as such, but instead imposes costs of doing business that FERC, as a ratemaker, must take as a given. Pet. 12-14. We submit that this Court's decisions foreclose petitioner's narrow view of the matters subject to FERC's exclusive jurisdiction, and that the square conflict between petitioner's order and FERC's order compels the conclusion that the former is preempted in any event.

a. This Court has made clear that FERC's exclusive jurisdiction "is not limited to 'rates' *per se*; '[the] inquiry is not at an end because the orders do not deal in terms of prices or volumes of purchases.'" *Nantahala*, 476 U.S. at 966. For instance, in *Mississippi Power* and *Nantahala*, the Court held that "FERC's exclusive jurisdiction applies not only to rates but also to power allocations that affect wholesale rates." 487 U.S. at 371. See 476 U.S. at 966-967. Likewise, in *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293 (1988), the Court held that a state statute requiring gas pipeline companies to obtain approval from the State's utilities commission for the issuance of securities infringed upon FERC's exclusive jurisdiction under the Natural Gas Act.[7] Although the Court noted that FERC "is not expressly authorized to regulate the issuance of securities by natural gas companies," *id.* at 304, the Court found that FERC's exercise of its authority entailed substantial oversight of the capital structure of those firms, *id.* at 301-304. After examining the purposes of the state statute, the Court concluded that "when applied to natural gas companies, [that statute] amounts to a regulation of rates and facilities, a field occupied by federal regulation." *Id.* at 307. That

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[7] This Court has noted that the Natural Gas Act and the Federal Power Act draw substantially the same line between state and federal authority. *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981).

conclusion was bolstered, the Court added, by "the imminent possibility of collision" between the state statute and FERC's regulation of interstate sales of gas; the state statute created the possibility that state authorities would disapprove securities transactions underlying FERC's ratemaking determinations. *Id.* at 310.

The principles applied in *Mississippi Power*, *Nantahala*, and *Schneidewind* compel the conclusion that petitioner's order is preempted. Maine Yankee has filed tariffs with FERC that have identified decommissioning costs as an element of costs to be recovered from its customers. In authorizing the utility's filed rates, FERC has addressed the size of the decommissioning fund required to retire the Wiscasset facility at the end of its useful life and the payments necessary to generate that fund. Unless FERC was acting outside its jurisdiction under the Federal Power Act, any conflicting determinations on these questions, issued under authority of state law, are necessarily preempted. See, *e.g.*, *Northwest Central Pipeline Corp.* v. *State Corporation Comm'n*, 489 U.S. 493, 515-516 (1989).

b. There are two reasons why FERC's jurisdiction to fix Maine Yankee's payments to its decommissioning fund may not be questioned in this case.

First, like the power allocations at issue in *Mississippi Power* and *Nantahala* and capital structure determinations alluded to in *Schneidewind*, the magnitude of Maine Yankee's contributions to its decommissioning fund are integral to the rates the utility may charge its customers. Maine Yankee's rates are directly dependent upon the amounts it must set aside to finance the decommissioning of its plant. As noted, FERC's established practice is to fix the costs of decommissioning a nuclear plant in setting wholesale rates. It is true that safety concerns and escalating costs in the nuclear industry give particular urgency to those determina-

tions. Nevertheless, the NRC is exclusively responsible for setting the standards necessary to assure the safe decommissioning of nuclear reactors, and FERC's responsibility for overseeing the financial operations of utilities that sell power at wholesale in interstate commerce is not nullified by the difficulties associated with retiring nuclear facilities.[8]

Second, to the extent that there may be a basis for dispute as to FERC's authority to fix Maine Yankee's decommissioning payments, the only proper avenue for resolving that dispute would have been an appeal from FERC's order approving Maine Yankee's rates. Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b), provides a "specific, complete and exclusive mode for judicial review" of FERC's orders. *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). See *Oklahoma Natural Gas Co.* v. *Williams Natural Gas Co.*, 890 F.2d 255 (10th Cir. 1989), cert. denied, 110 S.Ct. 3236 (1990). Under the filed rate doctrine, FERC's determinations regarding wholesale rates and matters underlying them are binding—subject only to direct review—on private parties, state authorities, and state and federal courts. *Mississippi Power & Light*, 487 U.S. at 371-372; *Nantahala*, 476 U.S. at 963-964. Here, although petitioner was a party to the proceeding in which FERC approved Maine Yankee's rates and had an opportunity to object to FERC's jurisdiction over decommissioning financing and the terms prescribed by the utility's filed rates, 18 C.F.R.

[8] Contributions to Maine Yankee's decommissioning fund are not, as petitioner and its amicus suggest (Pet. 14), analogous to taxes. Maine's legislature did not impose a generally applicable charge on utilities payable to the State. Rather, it authorized the State's public utilities commission to calculate the size of a financial reserve, funded by a utility for the sole purpose of retiring that utility's physical plant, and to set the payments required to accumulate that reserve. That task is indistinguishable from the financial determinations Congress authorized FERC to make in setting rates for utilities that sell power in interstate transactions subject to its jurisdiction.

385.602, it did not do so. Nor did petitioner seek judicial review. Petitioner does not have authority, in a proceeding under the NDFA, to determine that FERC's order was beyond the scope of its authority under the Federal Power Act; *a fortiori*, petitioner may not disregard that order in reaching a conflicting determination on the very issues FERC has resolved.

c. The Supreme Judicial Court's determination (Pet. App. 10) that "it is impossible for Maine Yankee to comply with both" FERC's order and petitioner's order is not subject to serious dispute. The settlement agreement approved by FERC fixes Maine Yankee's annual contribution to its decommissioning fund at $9,~~793,964~~ 073,943. The rates paid by the purchasers of its power are calculated to cover this sum and the utility's other costs while providing a given rate of return on equity, and the utility was prohibited from seeking a rate increase to cover any greater contribution prior to February 1991. Petitioner's order purported to require Maine Yankee to make higher payments to its decommissioning fund during the period it was unable to obtain a rate increase. Compliance with this order would necessarily undercut the rate of return on equity FERC had determined was appropriate.

Under *Mississippi Power* and *Nantahala*, this conflict between petitioner's and FERC's orders must be resolved in favor of the latter. Thus, even if the Supreme Judicial Court was mistaken in its determination that the NDFA's purpose is to regulate nuclear safety, petitioner's order is nevertheless preempted.[9]

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[9] We do not suggest, of course, that state regulation is preempted only when it is in conflict with a FERC order. Because the Federal Power Act preempts the field in which FERC exercises jurisdiction, see *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. at 300 (1988); *Northwest Central Pipeline Corp.* v. *Kansas Corp. Comm'n*, 489 U.S. at 509, "the preemptive effect of FERC jurisdiction" does not turn on "whether

3. Petitioner and its amicus suggest that further review is warranted to determine the extent to which States may regulate the decommissioning of nuclear plants selling power at wholesale. Pet. 5-9. It is true that "every state statute that has some indirect effect on rates and facilities" subject to FERC's jurisdiction "is not preempted." *Schneidewind*, 485 U.S. at 308-309. See *Northwest Central Pipeline Corp.* v. *State Corporation Comm'n*, *supra*. This case does not, however, call for a determination whether States retain *any* authority to address the decommissioning of nuclear plants selling power at wholesale in interstate transactions. Whatever the answer to that question may be, the grounds discussed above are sufficient to invalidate petitioner's order.

There are other reasons not to consider that general question in this case. This is apparently the first case to address the relationship between FERC's authority under the Federal Power Act and a state statute such as the NDFA. Maine Yankee is unusual in that it sells all of its power in wholesale transactions; we are advised that only five nuclear plants sell their entire output at wholesale. For all these reasons, further review by this Court is not warranted.

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a particular matter was actually determined in the FERC proceedings," *Mississippi Power*, 487 U.S. at 374. See generally *FPC* v. *Southern California Edison Co.*, 376 U.S. at 215-216.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1991

☆ U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/20572